Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

Of Counsel:

LAWRENCE B. KRAUS
General Counsel
Chamber of Commerce of the United States of America
1615 H Street, N.W.
Washington, D.C. 20062

STEPHEN A. BOKAT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

VINCENT J. APRUZZESE
MAURICE J. NELLIGAN, JR.
APRUZZESE & MCDERMOTT
Independence Plaza
500 Morris Avenue
Springfield, New Jersey 07081

Attorneys for the Chamber of Commerce of the United States of America

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	2
SUMMARY OF ARGUMENT	3
POINT I—The national labor policy of free collective bargaining is rooted in economic realities and requires mutuality of risk	5
POINT II—State intrusion into the core area of the bargaining process cannot be justified on the basis of congressional acquiescence	9
POINT III—State freedom to compensate strikers at the employer's expense threatens national labor policy on a broad front	20
CONCLUSION	25

Cases Cited

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	2
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)	8
Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970)	2
Brotherhood of Railway and Steam Ship Clerks, etc. v. Railroad Retirement Board, 239 F.2d 37 (U.S. App. D. C. 1956)	17
Buffalo Forge v. Steelworkers, 428 U.S. 397 (1976)	2
Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616 (1975)	2

PAGE

Farmer v. Carpenters, Local 25, —— U.S. ——, 97 S.Ct. 1056 (1977) 19, 20

Garner v. Teamsters Local 776, 346 U.S. 458 (1953) 15, 16, 20

Gateway Coal Company v. United Mine Workers of America, et al., 414 U.S. 268 (1974) 2

Grinnell Corporation v. Hackett, et al., 475 F.2d 449 (1st Cir. 1973), cert. denied 414 U.S. 858 16

Hill v. State of Florida, 325 U.S. 538 (1945) 10

H. K. Porter v. NLRB, 397 U.S. 99 (1970) 12

Local 20 Teamsters Union v. Morton, 377 U.S. 252 (1964) 9, 15

Local 24 Teamsters Union v. Oliver, 358 U.S. 283 (1959) 11, 12

Lodge 76 IAM v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 7-9, 11, 19

Malone v. White Motor Corp., —— U.S.L.W. —— (April 3, 1978, No. 76-1184) 12

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 12

New York Telephone, 208 NLRB 267 (1974) 23

NLRB v. Brown, 380 U.S. 378 (1965) 7

NLRB v. Bell Aerospace Company Division of Textron Inc., 416 U.S. 267 (1974) 2

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 6

NLRB v. Erie Resistor Corporation, 373 U.S. 221 (1963) 7

PAGE

N.L.R.B. v. Granite State Joint Board, 490 U.S. 213 (1972) 2

NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960) 6, 8, 12

NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 375 (1938) 7

N.L.R.B. v. Pittsburgh Plate Glass Co., 404 U.S. 517 (1971) 2

N.L.R.B. v. The Boeing Company, et al., 91 S.Ct. 1952 (1973) 2

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 16, 18

Philip Carey Manufacturing Co., 140 NLRB 1103 (1963), enf. 331 F.2d 720 (6th Cir. 1964) 11

Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz v. Lloyd W. McCorkel, et al., 416 U.S. 115 (1974) 2

United Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) 8

William E. Arnold Co. v. Carpenters District Council of Jacksonville, etc., et al., 417 U.S. 12 (1974) 2

Statutes Cited

Federal Unemployment Tax Act 16, 18

Labor-Management Reporting and Disclosure Act 10

National Labor Relations Act of 1935 ..... 3-5, 10, 12, 15, 18, 23

Sec. 8(d) 12, 18

Sec. 14(b) 13

PAGE

43 Pa. Stat. Ann. 911(a), 1101.1003 22
Social Security Act 16, 18
49 Stat. 449 6
73 Stat. 519 10
The Railroad Unemployment Insurance Act of 1938 16-18
The Railway Labor Act 17

29 U.S.C.:
151 5
158(d) 12, 18
164(b) 13
186(c)(8) 14
401 10
431 10
504 10

45 U.S.C.:
151 et seq. 17
351 et seq. 16
354(a-2)(iii) 18

Rule Cited

Rule 42 1

PAGE

Other Authorities Cited

41 Annual Report of NLRB, 225 (1976) 24
Hearings on Unemployment Compensation Benefits before the Subcommittee on Unemployment Compensation of the House Committee on Ways and Means, 94th Cong., 1st Sess., Phase I, 54 21
II Leg. Hist., National Labor Relations Act, 1935:
2300-2303 5
2312 8
S. Rep. No. 93-139, 93d Cong., 1st Sess. (1973) 13
U.S. Code Cong. & Admin. News 2007, 2010 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

This brief *amicus curiae,* in support of the petitioners, New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited), is filed by the Chamber of Commerce of the United States, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce, and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests, before the courts, the U. S. Congress, the Executive Branch and independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The question presented in the instant case is of vital concern to the Chamber and its members. Essentially, the case presents the question whether states may intrude upon the national labor policy of government neutrality

---

[1] E.g., *Buffalo Forge* v. *Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*; 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.*, 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.*, 91 S.Ct. 1952 (1973).

in labor disputes and the process of collective bargaining, by granting unemployment compensation benefits to strikers at the expense of their struck employer. Inherent in that question is the broader issue of whether, under the Supremacy Clause of the United States Constitution and the doctrine of pre-emption, as enunciated by this Court, states may compel an employer to financially assist a strike by his own employees, and thus tip the delicate economic balance so essential to effective collective bargaining and the resolution of labor disputes. Moreover, Chamber members contribute a very significant portion of the monies which constitute the Unemployment Insurance Funds of the various states. The Chamber, therefore, has a vital and continuing interest in the outcome of this litigation.

Summary of Argument

The issue posed is whether the national labor policy of free collective bargaining pre-empts a state statute which permits striking employees to receive unemployment compensation, a benefit extracted from the struck employer. The Second Circuit acknowledged a demonstrable conflict between the New York scheme and federal labor policy, but held that Congress had evidenced a tolerance of that conflict, thus, in its view, sparing the state statute from pre-emptive demise. The lower court based its conclusion upon a scattering of evidence, outside the context of the National Labor Relations Act.

The amicus argument, in opposition to that conclusion, is in three parts. First, we establish the necessary perspective, demonstrating the premise and basic purpose of the Act, namely, that the organized worker, through the mechanism of collective bargaining, should be and is granted equal say with management in how the product of the labor-capital joint venture will be distributed.

The development of that mechanism is traced, showing judicial recognition of the need for balance in the self-help measures available to the contenders. The process, in original concept, and as applied today, contemplates a distribution of power and/or resources in direct relation to economic strength or weakness, tested within a framework of mutual risk. In the second point, we begin with the lower court's finding of conflict between New York's payment of unemployment compensation to strikers and the federal collective bargaining policy. We argue that this conflict is a most destructive intrusion compared to state efforts to insure responsible union leadership, an effort earlier pre-empted by this Court, though later pursued by Congress to preserve the vitality of the labor movement. Decisions of this Court, emphatically interdicting a variety of state action, are reviewed to illustrate the primacy of the federal policy and its pre-emptive effect absent a clear, contrary demonstration by Congress. The Act itself is examined for evidence of congressional intention to pre-empt state action bearing on the bargaining relationship. That examination reveals that (a) Congress amended the Act to prohibit government influence on the substantive terms of the parties' collective bargain, (b) Congress amended the Act to provide that states were not pre-empted in their ability to regulate union security arrangements, and (c) when Congress amended the Act to permit bargaining for "legal services" trust funds, it imposed the condition that employer contributions could not be used to the prejudice of the labor-management relationship, thus exhibiting a congressional sensitivity totally at odds with the philosophy of the challenged statute. The factors relied upon by the Second Circuit do not manifest an intention by Congress to permit the substantial state intrusion found to exist here. Welfare programs which may benefit a needy striker and the payment of unemployment compensation

to striking employees of a "carrier", factors relied on by the court, are shown to offer no support for the court's conclusion and in fact are shown to reinforce the opposite conclusion. The fact that Congress has not prohibited the state action now challenged and the fact that there were efforts in that direction, begun but never fully developed, are shown to be equally unpersuasive evidence.

The final argument of the amicus demonstrates the damaging consequences which flow from this form of state intrusion. The state political process can manipulate the bargaining process and the mischief has natural application to the public sector. The economic reality of unemployment compensation to a striker is graphically shown in terms of a hypothetical New York wage earner who is on strike. Finally, attention is called to interstate impact on bargaining when certain states pay this form of assistance to strikers.

POINT I

The national labor policy of free collective bargaining is rooted in economic realities and requires mutuality of risk.

The pre-emption issue posed requires, first, a focus on the more elemental aspects of federal labor policy, its genesis and underlying premises. That policy, articulated principally in the National Labor Relations Act of 1935, was born largely of the belief that the unorganized worker was economically disadvantaged and that by advancing him to a position of equality, there would be a more equitable distribution of the fruits of his labor and his employer's capital. *II Leg. Hist., National Labor Relations Act, 1935,* 2300-2303. Accordingly, the Act espouses the dual policies of encouraging the "practice and procedure of collective bargaining" and of protecting the right to

organize. 49 Stat. 449, 29 U.S.C. 151. The Act appears to rest on inconsistent principles: (1) bargaining will reduce national unrest, and (2) effective bargaining requires the ability to disrupt. The process of bargaining, within the framework of the Act, is simply a means of harnessing strife so that when it occurs it is directed at a legitimate objective, i.e., a different distribution of power and/or resources within the rubric of wages, hours and other terms and conditions of employment. Whether there be strife or not, the process intends that the respective positions of the contenders will be rejected or entertained on the basis of perceived or demonstrated relative strength or weakness. It is a primitive rite built on economic reality.

> "The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 288 (1972).

The strike is the ultimate demonstration of that equality which Congress intended through the "practice and procedure" of collective bargaining. It is "part and parcel of the system", *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 489 (1960), and has been circumspectly treated by courts and Congress alike.

> "This repeated solicitude [by Congress] for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.

> While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant . . . preserving the positive command of §13 that the right to strike is to be given a generous interpretation within the scope of the labor act. The courts have likewise repeatedly recognized and effectuated the strong interest of labor policy in the legitimate use of the strike." *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221, 233-234 (1963) (footnote omitted).

It has been the function, partly of the N.L.R.B., but in all cases ultimately of this Court, to assure the continued institutional equilibrium of the bargaining process ordained by Congress. Thus, *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 375 (1938) affirmed the employer's right to continue operations and to hire permanent replacements for economic strikers. Yet, an employer's grant of superseniority to striker replacements, even for legitimate business reasons, was seen as drastically shifting the center of gravity, with "devastating consequences" on the right to strike. *NLRB* v. *Erie Resistor Corporation, supra*, 375 U.S. 235. The union's principal weapon of primary, total strike for economic gain can be preempted by an employer's lockout, not only in defense of its economic position, but also as a pressure device to obtain favorable terms from the union. *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965). Similarly, a multi-employer association may attempt to neutralize a union's selective strike against one member company by locking out employees of all non-struck member companies. *NLRB* v. *Brown*, 380 U.S. 378 (1965). The union weapon of "partial strike", legitimatized in *Insurance Agents, supra*, may be countered by employer disciplinary action or lockout. *Lodge 76 IAM* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

Of course, it was not always thus. The partial strike has been the subject of noteworthy judicial treatment. When the Court, in the *Briggs-Stratton* decision,[2] sustained a state injunction against a union's partial strike, it had assumed that "management . . . would be disabled from any kind of self-help to cope with these coercive tactics of the union" and could not "take any steps to resist or combat them without incurring the sanctions of the Act." 336 U.S. at 264. These assumptions were later invalidated by *Insurance Agents* and *American Ship Building Co.,* which recognized the employer's right to respond by discipline or lockout. In overruling *Briggs-Stratton,* the *Lodge 76* Court noted this restoration of self-help to the employer. It concluded that Wisconsin's denial to the union of a legitimate instrument of self-help would "frustrate effective implementation of the Act's processes". —— U.S. ——, 96 S. Ct. 2556-2557.

These benchmark decisions were concerned with maintaining or restoring self-help capabilities. The effectiveness of the device chosen will depend upon the staying power of the user and the extent to which the risk entailed becomes a reality. Bargaining works not only because the self-help devices permitted create risk of economic harm, but as well because for each device there is a counter-measure which presents its own risk. That is the natural outgrowth of the original concept designed to determine the share or division of the joint product of labor and capital. "[T]he essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." *II Leg. Hist., National Labor Relations Act, 1935,* 2312. The obvious prerequisite to that essential freedom is mutuality of risk and access to substantially equivalent self-help measures capable of testing economic strength or exposing economic weakness.

---

[2] *United Automobile Workers* v. *Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

POINT II

State intrusion into the core area of the bargaining process cannot be justified on the basis of congressional acquiescence.

The pre-emption test applicable here is whether Congress intended, within the framework of its national labor policy, to permit state payment to strikers of unemployment compensation benefits which are charged to the struck employer. The answer to that question ultimately depends upon whether the application of state law would operate to frustrate the purpose of the federal labor policy. *Local 20 Teamsters Union* v. *Morton,* 377 U.S. 252 (1964); *Lodge 76 IAM, supra.* The policy is one of free collective bargaining, through self-help if necessary, with economic power realities determining the result. The purpose of that policy is the settlement of disputes between two parties each legally recognized as having an equal say in the distribution of the fruits of their joint productive effort. In the instant case, the district court held the state payment of unemployment benefits to strikers to be in conflict with federal labor policy in that it is state intervention on behalf of strikers and causes an employer to finance its own strike. The court regarded it not only a truism, but a verifiable fact, amply supported by the record, that the expectation or receipt of substantial, weekly, tax free payments to strikers is a substantial factor in the decision to initiate a strike or in the maintenance of it. 434 F.Supp. 813-814, 824. The Court of Appeals implicitly accepted the lower court's factual determinations and *conceded* that the state statute was in conflict with federal labor policy. 566 F.2d 388, 395. The Second Circuit did not dwell on the particulars of the conflict or on the policy involved. It acknowledged the general requirement of state neutrality

and "the otherwise broad preemptive scope of the federal labor laws", but nonetheless found the striker payments, here, permissible. 566 F.2d 395.

Conflict may, of course, be manifested in various ways. *Hill* v. *State of Florida*, 325 U.S. 538 (1945) held Florida's licensing and disclosure provisions, directed at unions and their agents, and enforceable by sanctions, to be repugnant to "the full freedom" guaranteed by the National Labor Relations Act to employees in the selection of their bargaining representatives. "The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation." 325 U.S. 542. There is nothing inherently prejudicial in requiring a union to disclose its name, address, officers, etc., or in attempting to insure that convicted felons not be permitted to operate as union business agents, which were the features of the challenged Florida statute. Indeed, in 1959, Congress imposed essentially the same requirements on unions when it enacted the Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. 401, 431 and 504. The overriding concern in both instances was to insure that union representatives, in whom the law vests substantial power as equals in collective bargaining, should first be responsible participants. If a state may not make such judgments and screen out the irresponsible participants, why should a state be able to intervene in the core area of the process and disrupt the interplay of economic forces? Such licensing and disclosure requirements, by whomever imposed, are not directed at the heart of the process by which industrial disputes are to be resolved. It is surely otherwise with a state statute which transfers employer resources to those who have withheld their labor in the hope of coercing from that very employer a larger share. It is relevant to note in this regard that, under federal labor law, a struck employer has the right to with-

hold from striking employees not only wages, but indirect compensation as well, e.g., insurance benefits. *Philip Carey Manufacturing Co.*, 140 NLRB 1103 (1963), enf. 331 F.2d 720 (6th Cir. 1964). Thus, the New York statute, in effect, compels an employer to do that which the federal statute permits him to avoid. This is frustration of the federal policy at the most fundamental level. It replaces risk with certainty, it removes the "self" from self-help so far as the union is concerned, and it confronts the employer with a weapon for which there is no counter-measure except to make those concessions dictated by the artificially rearranged economic power realities. Relatively speaking, it is "no-risk" bargaining; it is virtually "free" collective bargaining for the union, but very costly for the employer. His role shifts from self-help to adversary-help. We dwell on this not because the asserted conflict is in serious dispute (we doubt that it could be), but because the degree of conflict is so substantial that such an intrusion into the bargaining process should not be allowed in the absence of unmistakable congressional intent to permit it.

A diligent review of the authoritative decisions relevant to this branch of the pre-emption doctrine leaves no doubt that if the New York statute is to be spared, that result must flow from a clear showing that Congress intended that the states be free to compromise the very essence of the collective bargaining process. In the strongest possible language, this Court has interdicted: (1) state action which intruded upon the mechanics of bargaining, *Lodge 76 IAM, supra,* prohibiting the state injunction of a partial strike; (2) state action which intruded upon substantive terms bargained for in compliance with the federal duty to negotiate in good faith, *Local 24 Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959), prohibiting application of a state's anti-trust statute to

invalidate a collectively bargained wage agreement;[3] and (3) state action, in the form of an unemployment compensation determination, which impeded the exercise of rights guaranteed by the Act, *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967), prohibiting a state determination on eligibility for unemployment compensation to undermine a right recognized by the Act. Each of these cases has direct application here to a state statute which does violence to the mechanics of bargaining, to the substantive terms which are to be collectively bargained, and to the employer's right under the Act to freely decide what proposals are satisfactory to it (*H. K. Porter* v. *NLRB,* 397 U.S. 99 (1970)), uncoerced by state determinations on eligibility for unemployment compensation.

Everything that has been said to this point regarding judicial protection of federal labor policy was reduced by the Second Circuit to the simple hornbook axiom recognizing the "broad pre-emptive scope of federal labor laws". A similar amount of discourse was expended on the Act itself: "[the Act] makes no mention of unemployment compensation." True enough, but that is not the end of it if one is searching for evidence of intention. Section 8(d) of the Act, 29 U.S.C. 158(d), a product of the 1947 Taft-Hartley Amendments, not only reaffirms the duty to bargain, but also crystalizes the congressional intention that the parties are free to bargain out their differences without regulation by the National Labor Relations Board. *Local 24 Teamsters* v. *Oliver, supra,* 358 U.S. 295; *NLRB* v. *Insurance Agents, supra,* 361 U.S. 488.

---

[3] Cf. *Malone* v. *White Motor Corp.,* —— U.S.L.W. —— (April 3, 1978, No. 76-1184) where this Court declined to pre-empt a state statute which regulated certain aspects of pension plans. It reasoned that Congress, by express terms, had clearly intended the states to undertake the very kind of regulation challenged in that decision.

The same 1947 amendments expressed only one exception to that freedom to bargain. By Section 14(b), Congress has explicitly permitted state interference with the bargaining process to the extent that compulsory union membership—the economic lifeblood of unions and an otherwise required subject of bargaining—may be barred by state action. In setting the limits of federal pre-emption, 29 U.S.C. 164(b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

A pointed demonstration of congressional sensitivity to the bargaining relationship is found in a 1973 amendment, and its legislative history, regarding the propriety of bargaining for jointly administered trust funds used to defray the costs of legal services for employees. The amendment responded to the congressional observation that routine legal services were frequently beyond the reach of employee purchasing power. Before its enactment, however, concern was expressed by Senator Taft and others that employer contributions not be used to finance "offensive legal actions bearing directly on labor-management relations". The Senate Report was in accord:

> "Specifically, such funds should not only be prohibited from use for litigation, but also from counseling and legal advice with respect to disputes or proceedings in the labor-management context." S. Rep. No. 93-139, 93d Cong., 1st Sess. (1973), U.S. Code Cong. & Admin. News 2007, 2010.

As enacted, the amendment prohibits the use of trust funds for legal services "to initiate *any* proceeding" against the contributing employer, the bargaining representative of the covered employees, or for that matter against any other employer or union "in any matter arising under the National Labor Relations Act, as amended, or this Act". 29 U.S.C. 186(c)(8). Congress authorized only one exception to the all inclusive term "any proceeding", i.e., a workman's compensation case. This exception was made "because the cost of such representation is deducted from awards in most states, and represents a major item of legal expense to employees generally". Noting that such proceedings are only "nominally against employers", the Senate Report further observed: "[O]f course, nothing in this Bill requires an employer to agree to the use of a trust fund for such [workman's compensation] purposes". U.S. Code Cong. & Admin. News 2007. Even this exception, therefore, is one that the employer has the right to resist in free collective bargaining. Notice that services cannot even be furnished in connection with the prosecution of *an unemployment compensation claim*. What this treatment clearly reflects is congressional determination that the fruits of the bargaining process (assuming the parties in fact agree to create such a trust fund) shall not be used to undermine that process and victimize the employer with his own contributions. Because, in any event, an employer would only contribute such funds if he voluntarily agreed to do so, this congressional treatment demonstrates an extremely sensitive concern for the integrity of the collective bargaining process and the labor-management relationship. And it is clear from the Senate Report that the protections provided were necessary to the amendment's enactment.

There is an egregious inconsistency between Congress' sensitivity to the use of employer funded, legal trust

funds, voluntarily created, which would support the relatively modest legal necessities of employees, and the Second Circuit's conclusion that the forced transfer of $49,000,000.00 from New York Telephone to the pockets of its striking employees, a transfer which admittedly "alters the balance in the collective bargaining relationship", is the kind of alteration which Congress is willing to tolerate. If such tolerance is perceived, how does that square with the inability of a striking employee to perfect his unemployment compensation claim under a statute like New York's, using trust funded legal services?

The Second Circuit said "Our review of the relevant legislative history discloses no clear pre-emptive intent . . ." 566 F.2d 395. That "review" was confined to a variety of other federal legislation and virtually ignored the history of the one statute under which pre-emption was claimed. The only historical reference to the National Labor Relations Act focused on the Hartley Bill's unsuccessful effort to redefine "employee" to exclude strikers who accepted unemployment compensation, an example of what Congress failed to do, rather than what it has done. Given the evident fact, derived from that Act, that a most compelling national interest and policy is at stake here, state intrusion may not be permitted absent an affirmative showing that Congress clearly intended to permit compromise of its own policy. *Local 20 Teamsters* v. *Morton, supra; Garner* v. *Teamsters Local 776,* 346 U.S. 458 (1953). There is no such showing. What the Second Circuit relied upon was (a) no express federal prohibition of the challenged state action, (b) unsucceessful efforts to obtain such a prohibition, (c) several federal, social programs which do or can extend welfare benefits to strikers or children of strikers if "need" is demonstrated, (d) federal authorization in The Railroad Unemployment Insurance Act of

1938 to pay unemployment compensation to striking employees of a carrier, 45 U.S.C. 351 et seq., and (e) this Court's refusal to find pre-empted under the Social Security or Federal Unemployment Tax Acts a state's denial of unemployment compensation to one laid off in the ripple effect of a strike.[4]

The absence of a federal prohibition on the state's payment of unemployment compensation to strikers is meaningless. "We must spell out . . . the area [under the N.L.R.A.] in which state action is *still permissible.*" *Garner* v. *Teamsters Local 776,* 346 U.S. at 488. In "the area of labor combat *designed to be free*" silence does not suggest consent to state regulation. *Garner,* at 500 (emphasis added). Efforts which did not succeed in creating a prohibition shed no light on the will of Congress when those efforts were undertaken by those other than Congress and when they stopped far short of congressional action. *Grinnell Corporation* v. *Hackett, et al.,* 475 F.2d 449, 455, 456 (1st Cir. 1973), cert. denied 414 U.S. 858.

Welfare legislation is unrelated to the employment relationship. Judicial notice may be taken that a significant number of full time employees are so situated with family responsibilities that they qualify as "needy" under the several welfare programs. The source of benefit funds, the class benefited and the qualifications for benefit do not directly impact upon the labor-management relationship. Such grants may benefit individual qualifying strikers—in given strikes, none may qualify—but there is no statutory expression which benefits strikers as a class. Eligibility is based upon an assessment of

[4] *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977).

"need". The cause of that "need" may be disregarded. General revenues fund such programs; no assessment is made against a particular class. The presence of such welfare programs which may embrace needy strikers and their families buttresses the claim that unemployment compensation may not impinge on collective bargaining. Congress was well aware that genuine "need" might spring from a striker's particular plight as well as from a host of other circumstances, and that need can be accommodated within general welfare programs. Collective bargaining may entail "combat", but it does not imply a license to annihilate an adversary. Conversely, welfare programs may respond to the needy striker, but not by reaching into the pockets of the employer, or by requiring the employer to finance strikers regardless of need.

The Second Circuit points to the Railroad Unemployment Insurance Act of 1938. To mention it is to distinguish it. Because Congress in the first instance (1926) treated "carriers" separately and differently from all other employers, 45 U.S.C. 151 et seq., and because Congress thereafter was moved again to treat them separately and differently by assuring their employees unemployment compensation benefits during periods of strike, this disparity simply reinforces the conclusion that Congress intended different treatment for employees of non-carriers. The strike benefit aspect of this legislation was designed to encourage compliance with the "cooling off" procedures of The Railway Labor Act. *Brotherhood of Railway and Steam Ship Clerks, etc.* v. *Railroad Retirement Board,* 239 F.2d 37, 43 (U.S. App. D. C. 1956).[5]

[5] To resolve the . . . question . . ., two factors control our inquiry. The first is the purpose of Congress in granting to employees of railroads, unlike industrial employees generally, unemployment benefits while on strike . . ." 239 F.2d 41.

Thus, carrier employees who strike in violation of those statutory procedures are denied unemployment compensation. 45 U.S.C. 354(a-2)(iii). But Congress has elected to treat "industrial" employees differently. Those employees of employers subject to the National Labor Relations Act are induced to comply with the notice requirements and the mediation scheme of that Act not by the promise of benefit, but rather by the threat of losing their "employee" status. Thus, Section 8(d), the very section which generates the national policy of collective bargaining, also provides that those who strike in violation of statutory notice requirements forfeit "employee" status. 29 U.S.C. 158(d). The Railroad Unemployment Insurance Act is but one insight into congressional thought in this area. In another statute Congress has forbidden payment of unemployment benefits to strikers in the District of Columbia, an action completely consistent with its Section 8(d) "forfeiture" philosophy. Irrespective of the availability of striker unemployment compensation as under the Railroad Act or nonavailability under the District of Columbia statute, it is beyond question that Congress knows well how to provide for either approach and does so in explicit terms, when it so intends.

Finally, there is the *Hodory* decision. The fact that this Court, in *Hodory,* expressly reserved the labor law pre-emption issue neutralizes, as to the instant case, the Court's pre-emption conclusions under the Social Security and Federal Unemployment Tax Acts.

None of the bases relied upon by the Second Circuit evidence a clear congressional intent to permit the frustration of the bargaining process shown to exist in this record by New York's grant of unemployment compensation to striking employees. Finding no clear intention to pre-empt, instead of looking for evidence of a clear intent to

permit, the Second Circuit has imputed to Congress an acquiescence or tolerance of the state program.

What Congress tolerates is not a proper basis for decision. That observation is dramatically demonstrated by this Court's contrary pre-emption decisions in two cases presenting similar facts, *Briggs-Stratton* and *Lodge 76 IAM, supra.* The former held permissible, as not pre-empted by federal labor policy, state action enjoining concerted employee interference with the employer's production process. The Court reasoned that "Congress designedly left open an area for state control", and (like the Second Circuit in the instant case) it found no evidence that Congress had "clearly manifested an exclusion of the state power sought to be exercised in this case". 336 U.S. 253. Twenty-seven years later, with no expression heard from Congress, the Court in *Lodge 76 IAM* overruled *Briggs-Stratton* and held pre-empted state action enjoining a concerted employee refusal to work overtime. The Court said "There is simply no question that the Act's processes would be frustrated . . . were the State's ruling permitted to stand." The Court found it ". . . clear beyond question that Wisconsin '[entered] into the substantive aspects of the bargaining process to an extent the Congress has not countenanced' [citing *NLRB* v. *Insurance Agents*, 361 U.S. at 495]". 96 S.Ct. 2557. Congressional tolerance is irrelevant.

Given the fact of conflict, conceded by the Second Circuit in the instant case, the claim of pre-emption may not be cavalierly dismissed in light of congressional and judicial concern for the integrity of free collective bargaining. This concern has found expression in numerous decisions of this Court. *Farmer* v. *Carpenters, Local 25* makes clear that state action must be "consistent with effective administration of the federal scheme", —— U.S.——, 97 S.Ct. 1056,

1063 (1977). *Garner* v. *Teamsters Local 776,* often quoted by this Court with approval, declares:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.", 346 U.S. 485, 500 (1953).

POINT III

State freedom to compensate strikers at the employer's expense threatens national labor policy on a broad front.

Allowing states a free rein to legislate in this area can produce many discrepancies, each with its individual impact upon federal labor law. Disqualification periods and compensation rates provide the major areas of discrepancies. The State of New York regards an eight-week disqualification of strikers as the measure of state "neutrality" in labor disputes affecting interstate and intrastate commerce. *New York Telephone, supra,* n.5. In Rhode Island, the measure is seven weeks. A 1978 proposed amendment to the California unemployment compensation statute would provide a maximum five week disqualification for strikers. SB2054. If state legislative judgment is predominant, there is no obstacle to concluding that a more accurate measure of "neutrality" is a three-week or one-week disqualification for strikers.

Most states presently consider that a benefit of one-half the average weekly wage is a justifiable level of compensation in terms of the program's social objectives. But these states are free to increase that ratio, just as the states are free to increase the taxable wage base.

Puerto Rico, for example, levies its tax on 100% of the wages paid, rather than on the first $6,000.00 of wages, which is the base observed by most states.[6]

Accordingly, equality of bargaining power between employer and employee could vary considerably from state to state. A lower disqualification period and higher benefit would more easily crush employer resistance. Unions and strikers could declare open season on an employer's checkbook, one way or the other, through higher settlements or longer strikes. The concept of a national policy where management and labor each has an equal say in the distribution of the fruits of their joint productive effort would be subordinated to the political vagaries within each state.

As an example of what a striking employee earning $230.00 per week working and living in New York City would expect to receive after being on strike eight weeks, we submit the following:

A Married Employee With 4 Dependents, Including Himself:

Gross Pay	*Federal Income Tax Withheld*	*F.I.C.A. Deduction*	*New York State Tax*	*New York City Tax*	*Net Pay*
$230.00	$19.70	$13.92	$6.70	$2.80	$186.88

Under current New York law, this employee would be entitled to $115.00 nontaxable unemployment compensation per week, leaving a net loss of $71.88 per week. The International Brotherhood of Teamsters, the largest indi-

---

[6] *Hearings on Unemployment Compensation Benefits* before the Subcommittee on Unemployment Compensation of the House Committee on Ways and Means, 94th Cong., 1st Sess., Phase I, 54.

vidual union in the United States, pays $45.00 per week as a strike benefit to strikers on strike for more than one month and accordingly, an employee receiving that particular type of benefit, also nontaxable, would only be losing $26.88 per week. As already indicated elsewhere in this brief, this employee and his family in case of need have the opportunity to seek welfare benefits in various forms under current federal and state statutes. Accordingly, this striking employee has extremely little at risk during the course of this strike and the entire $115.00 per week is charged against his employer, while the strike persists. Obviously, such treatment could vary from state to state, depending upon the operative factors in each instance.

Higher benefits, shorter waiting periods and broader tax bases are not the only possibilities. If paying employer funds to striking employees is a valid policy and does not frustrate the bargaining process in the private sector, does it end there? If it is federal policy, judicially approved, it is ripe for application to the public sector. The last decade has been a veritable "gold rush" for public sector unions. Public employees and their unions are clamoring for the right to strike. Some employees, such as those in Pennsylvania, already have it. 43 Pa. Stat. Ann. 1101.1003. Pennsylvania permits public employees to receive unemployment compensation under the same program covering the private sector. 43 Pa. Stat. Ann. 911(a). The public (employer) pays such benefits to its employees. If it is permissible to extract support from an employer in the form of striker benefits, the citizens of Pennsylvania need only wait for the right political mix before their public employees, who already have the right to strike, will also be entitled to "unemployment" compensation from the public (employer) while they engage in their private combat against the public treasury. State

legislatures, which are notorious for copying federal programs, can cite as justification the federal "tolerance" of striker assistance in the private sector, and public sector unions will invoke the usual observation that public employees should not be treated as "second class citizens". Where does it end? It doesn't. It breeds irresponsibility. It permits gain without risk. And eventually it corrupts the process.

The effects of one state's unemployment statute can go beyond the border of that state and in fact have nationwide repercussions. A union may pick one employer or unit as the target. The agreement negotiated there would become the pattern-setter for the rest of that particular industry.[7] Picking as the target a company or a plant located in a state where strikers can receive unemployment benefits might produce a higher settlement than might otherwise have resulted, which would then become the standard for settlement on national issues throughout the company or industry. The result would have serious impact on interstate commerce and most improperly increase the already raging inflationary pressures in our economy.

The risk of further undermining federal labor policy is all too apparent where strikers can receive benefits despite their disregard or violation of federal labor law.[8] The Act does not require the NLRB to seek injunctive relief for every unlawful strike, only those reasonably thought by the Board to involve unlawful secondary or recogni-

---

[7] This was in fact the practice followed by the Communications Worker's of America in this case.

[8] Witness the fact that the strike in the *New York Telephone* matter was indeed found to be an illegal strike under federal labor law. 208 NLRB 267 (1974).

tional objectives. Given the Board's reluctance to use its discretionary authority to enjoin other unlawful conduct,[9] a union strike in support of an unlawful bargaining demand can be maintained for an extended period of time before Board adjudication.

Thus, despite disregard for federal law and illegal activity on the part of the strikers, the victim of this conduct, the employer, can be forced solely because of state law to finance its perpetration. Fair play and reasonable rules to regulate commerce are meaningless if this is permitted. In reality, such laws will provoke constant strife, not peace, disobedience, not respect for law.

The New Deal, the Fair Deal, the New Frontier, the Great Society, all of the attractive goals held up to America as attainable in a free dynamic economy require full production and the complete effort of everyone. To unduly sap the energy of any participant in pursuing these goals by weighting the collective bargaining process with such state intrusion undermines the process. Free collective bargaining is no longer free where either side is penalized for exercising its economic rights. It will destroy the process.

[9] Exercised on only 25 occasions in fiscal 1976, *41st Annual Report of NLRB*, 225.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

VINCENT J. APRUZZESE
APRUZZESE & MCDERMOTT
A Professional Corporation
Attorneys for Chamber of Commerce of the United States of America